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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION II
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MAR 17, 1989

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Gentlemen:

This is in further response to your petition regarding the emissions offset exemption for resource recovery facilities in Part 231 of the New York State Implementation Plan (SIP). You asked the Environmental Protection Agency (EPA) to call for revisions to the New York SIP to eliminate this exemption. For the reasons discussed below, EPA is not taking final action on your petition at this time. Rather, because the merits of your petition are closely linked with EPA's outstanding call for revisions to the New York SIP to correct the State's failure to meet ozone and carbon monoxide air quality standards, and for other reasons, the petition will be held in abeyance pending further action on the current SIP call.

I. THE SIP CALL PROCESS

Section 110(a)(2)(H) of the Clean Air Act establishes a process whereby states are to revise their SIPs "whenever the Administrator finds on the basis of information available to him that the plan is substantially inadequate to achieve the national ambient air quality standard [NAAQS] ... or to otherwise comply with any additional requirements established under the Clean Air Act Amendments of 1977." It is clear from this provision and the overall statutory scheme that whether the Administrator should make a finding of "substantial inadequacy," and hence, call for corrective SIP revisions by the state, is a matter within the Administrator's discretion. This discretion extends to both the finding of substantial inadequacy and the content of the corrective measures that the Administrator may require of the state in response to the SIP call.

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II. THE NEW SOURCE REVIEW OFFSET REQUIREMENT AND PART D SIP ADEQUACY

The new source review (NSR) provisions, Part D of the Clean Air Act and the current EPA regulations at 40 C.F.R. 51.165, contain numerous requirements applicable generally to major new stationary sources of air pollution and major modifications locating in an area designated as nonattainment for a particular pollutant under section 107 of the Act. As you point out in your petition, section 172(b) (6) provides that new major sources and major modifications must obtain a permit in accordance with section 173. The state must determine, as a condition for granting that permit, that the new source has obtained offsetting emissions reductions from other sources such that operation of the source will represent "reasonable further progress" toward attainment of the NAAQS (see section 173(1) (A)), or that emissions

from the new source will not exceed a growth allowance for the pollutant that the state has established under section 172(b) (see section 173(1)(B)). 40 C.F.R. 51.165(a) (2) directs states to adopt a NSR program meeting the requirements of sections 172(b) (6) and 173. The EPA regulations in 40 C.F.R. 51.165 do not specifically allow nor prohibit exemptions from the offset provision.

Although the above provisions establish the general requirements of new source review under Part D, neither the Act nor EPA's regulations are self-executing. Rather, the specific NSR requirements that must be met in a given state are those contained in the regulations set forth in the state's NSR program as it has been approved by EPA as part of the SIP. Thus, the New York SIP, at 6 N.Y.C.R.R. Part 231.6, imposes emissions offset requirements on major sources generally. However, Part 231.9(c) (1) exempts resource recovery facilities from that requirement. EPA approved New York's offset rules, and the resource recovery exemption, as part of the State's SIP on May 21, 1980 (45 Fed. Reg. 33981). No party sought judicial review of EPA's approval during the 60-day period provided in section 307(b) (1) of the Act.

At the time EPA approved New York's NSR program, the Agency had not promulgated any Part 51 regulations setting forth the requirements for approval of state NSR programs under Part D. Those regulations, originally designated as 40 C.F.R. 51.18(j) and presently codified at 51.165, were not promulgated until August 7, 1980 (45 Fed. Regs. 52676, 52687, 52743). Rather, in reviewing the New York program, EPA was guided by the Emission Offset Interpretative Ruling appearing in Appendix S to 40 C.F.R. Part 51. see 44 Fed. Reg. 3282 (Jan. 16, 1979). Section I.V.B.i

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of the Offset Ruling contains provisions for exempting resource recovery facilities from the offset requirement under certain conditions.

Although the Offset Ruling has been largely superseded by the Part 51 regulations, EPA still utilizes it for guidance purposes in certain respects[SEE FOOTNOTE 1]. Nevertheless, at least as a matter of policy, EPA no longer adheres to the resource recovery facility offset exemption in the Offset Ruling. Thus, as explained in a March 14, 1988 letter from Conrad Simon, Director, Air and Waste Management Division, Region II, to Harry H. Hovey, Jr., P.E., Director, Division of Air Resources, New York State Department of Environmental Conservation (Enclosure A), EPA will not approve a proposed SIP revision which contains such an exemption.

III. THE ADEQUACY OF NEW YORK'S NSR PROGRAM AND THE NEED FOR A SIP CALL

As noted above, whether and when the Administrator makes a finding of SIP inadequacy is a matter within his discretion under the scheme of the Clean Air Act. Beyond the statutory framework, this discretion is vitally important as a practical matter to enable EPA to discharge its many duties under the Act. Thus, in addressing potential SIP discrepancies, it is necessary to determine the severity of the matter at issue, establish its priority in relation to other pressing business, consider the range of available curative options, and evaluate the effects of a given course of action on other matters. Only then can the Agency decide whether a particular matter rises to the level of a substantial inadequacy justifying a call for SIP revision under section 110(a)(2)(H).

In light of the above, EPA has considered the following factors to be important in evaluating your petition.

A. EPA's Informal Attempts to Resolve the Matter.

EPA is currently attempting to resolve the issues raised in your petition through informal means.

[FOOTNOTE 1] The Offset Ruling applies only in narrow circumstances. For example, it governs permitting of major sources in newly designated nonattainment areas that are subject to Part D requirements while the affected state makes necessary revisions to its new source review rules. See 44 Fed. Regs. 20372, 20379 n. 36 (1979).

EPA has requested New York to amend its NSR program to eliminate several differences between Part 231 and the federal NSR requirements. See the March 14, 1988 letter from EPA Region II to New York (Enclosure A). The letter asks, as part of New York's fiscal year 1988 grant workplan, that the State address several issues, including the emission offset for resource recovery facilities. This effort at informal resolution is ongoing, as indicated by the State's response to the March 14 letter. See letter, Harry H. Hovey, Jr., P.E., to Conrad Simon, April 4, 1988 (Enclosure B).

In addition, EPA has recently written the state to explain that 40 C.F.R. 51.165, and not the Offset Ruling, presently governs the approvability of NSR rules. Hence, the letter explains, the Offset Ruling is not an obstacle to the removal of the offset exemption from the New York SIP. See letter, Conrad Simon to Thomas M. Allen, P.E., Acting Director, Division of Air Resources, New York State Department of Environmental Conservation, March 17, 1989 (Enclosure C).

B. Determining the Impact of the Exemption on the Adequacy of the New York SIP.

In determining whether the offset exemption renders the New York SIP substantially inadequate to achieve the NAAQS or meet the NSR requirements of Part D, it is appropriate to evaluate the environmental impact of the offset exemption in question. This impact is relevant because it is apparent from the statute that the primary purpose of the NSR requirements as a whole, and the offset provision in particular, is as a planning tool to insure that new source growth is consistent with reasonable further progress toward attainment of the NAAQS. It follows that to the extent an offset exemption has no significant bearing on a state's ability to attain the NAAQS, it is unlikely, standing alone, to be considered a substantial inadequacy in the NSR portion of the SIP. In light of other current Clean Air Act requirements and prospective additional measures (discussed below) EPA doubts that it could establish at this time that the resource recovery offset exemption presents a substantial environmental problem that by itself creates a substantial inadequacy in the New York SIP.

1. The Affected Pollutants.

With respect to offsets from resource recovery facilities in New York, the pollutants relevant to your petition are carbon monoxide and particulate matter (i.e., total suspended particulates, or TSP). These are the only criteria pollutants potentially affected by offset provisions, because they are the only pollutants subject to Part D requirements for which the State has designated nonattainment areas and which typically are

emitted in major amounts (greater than 100 tons per year) by resource recovery facilities. See 40 C.F.R. 81.333. [SEE FOOTNOTE 2]

Regarding carbon monoxide, as discussed below, EPA plans to consider, in conjunction with the second phase of New York's response to the outstanding SIP call for ozone and carbon monoxide, whether formal action on New York's offset exemption is necessary to address a substantial SIP inadequacy. With respect to particulate matter, the prevention of significant deterioration (PSD) program should preclude a substantial SIP inadequacy.

2. New York Is Currently Experiencing No Violations of the New PM- 10 Standards for Particulate Matter. In Addition, EPA Requires Offsetting of Particulate Emissions Under the PSD Provisions of Part C of the Act, and May Soon Eliminate the Part D Requirements for Particulates Altogether.

EPA is in the midst of a transition to a revised set of regulatory standards for particulate matter. When this transition is complete, the Part D requirements will be eliminated. In the meantime, new sources must offset their particulate emissions under the Act's PSD requirements so as to not cause or contribute to a NAAQS violation. In addition, there are currently

no violations of the revised standards in New York. Accordingly, the offset exemption in the New York SIP apparently does not present a substantial SIP inadequacy as to particulates.

On July 1, 1987, EPA replaced TSP as the NAAQS indicator for particulate matter pollution. See 52 Fed. Reg. 24635. Under the revised NAAQS, EPA employs a new indicator, termed "PM-10," that includes only those particles with an aerodynamic diameter less than or equal to a nominal 10 micrometers. (It should be noted that the vast majority of particulate emissions of resource recovery facilities are 10 micrometers or less in diameter.) In the implementing regulations which accompanied the revised particulate matter standards, EPA provided that the requirements

[FOOTNOTE 2] Using the example of the Brooklyn Navy Yard project cited in your petition at p.1 n.1, resource recovery facilities typically also emit major amounts of sulfur dioxide and nitrogen oxides. However, New York has no designated nonattainment area for those pollutants. While there are designated ozone nonattainment areas in the State, resource recovery facilities (e.g., the Brooklyn Navy Yard project) generally do not emit volatile organic compounds in major amounts.

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of a state's preexisting TSP SIP, including new source review requirements under Part D of the Act, generally will remain in place until EPA approves a PM-10 SIP for the state. See 52 Fed. Regs. 24672, 24679. New York submitted a PM-10 SIP to EPA for approval on May 31, 1988. The state's PM-10 SIP is currently undergoing review in Region II, and likely will be submitted to EPA headquarters for approval in January 1989. Upon approval of New York's PM-10 SIP, the Part D requirements governing particulates, including the TSP offset provisions, will be eliminated.

During this transition period, the PSD provisions of Part C of the Clean Air Act independently require that major new sources, including resource recovery facilities, obtain emissions offsets essentially similar to those you assert are required under Part D. Under section 165(a) (3), major new sources subject to PSD must not "cause or contribute to" a NAAQS violation. This requirement is set forth in EPA's PSD regulations. See 40 C.F.R. 51.166(k) (requirements for state PSD plans); 40 C.F.R. 52.21(u) (federal PSD regulations). New York does not have an approved PSD rule. Hence, EPA has delegated to New York the authority to issue PSD permits in the state pursuant to 52.21(u). See 52.1689. Under 52.21(k), a major new source that would locate in an area within New York that is lacking an approved PM-10 plan and is experiencing PM-10 violations must obtain sufficient offsetting emissions reductions at other facilities so as to provide a net air quality benefit and thereby help remedy the nonattainment problem. In an area within New York that is lacking an approved PM-10 plan but is without current PM-10 violations, a new source that would cause a violation of the PM-10 standards must provide offsets that compensate on a one-for-one basis for its adverse air quality impacts, and thereby prevent the NAAQS violation. See 52 Fed. Reg. 24684 n. 14, 24686-87, 24699.[SEE FOOTNOTE 3]

Monitoring data has not disclosed any violations of the PM-10 standards in New York during the last three years. Thus, at the present time, major new resource recovery facilities in New York would need to offset their ambient impacts on a one-for-one basis if necessary, to prevent a violation of the new particulate matter standards. Because particulate emissions of resource

[FOOTNOTE 3] In addition, as a condition for approval of its PM-10 SIP, New York must adopt an emissions offset program meeting the requirements of 40 C.F.R. 51.165(b) and section 110(a)(2)(D) of the Act. That program must be at least as stringent as the PSD offset program described above.

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recovery facilities are predominantly PM-10 emissions, the PM-10 offsets required by PSD would provide virtually the same amount of reductions in particulate emissions as would be provided by TSP offsets under a Part D offset requirement.

In sum, as to major new sources of particulate emissions, the offset

provisions of Part D are largely vestigial, and upon completion of the transition to PM-10, will disappear altogether. That transition is underway in New York. In the meantime, in order to comply with applicable PSD requirements, major new particulate sources, including resource recovery facilities, must still offset their ambient impact if they would cause or contribute to a NAAQS violation. No monitored violations of the revised PM-10 standards are extant at present. If any should arise, then a new resource recovery facility would have to obtain sufficient offsets so as to provide a net air quality benefit.

Under these circumstances, it does not appear that the Part D offset exemption for resource recovery facilities in the New York SIP presents a substantial inadequacy as to particulate matter within the meaning of section 110(a)(2)(H).

C. The Importance of New York's Outstanding Part D
SIP Call.

EPA is considering whether to take action to remove the resource recovery facility offset exemption from the New York SIP in conjunction with EPA's current ozone and carbon monoxide SIP call to the State. Thus, as there is an outstanding SIP call that may result in a requirement that New York provide the relief you are seeking, it would be premature at this time to make a separate SIP call as requested in your petition.

On May 26, 1988, EPA Regional Administrator Christopher J. Daggett notified New York Governor Mario M. Cuomo that the New York SIP is substantially inadequate to achieve the NAAQS for ozone and carbon monoxide in certain areas. See Enclosure D. That SIP call was one of several issued at the same time to numerous states, in accordance with EPA's emerging post-1987 ozone-carbon monoxide nonattainment policy. See 53 Fed. Reg. 20722, June 6, 1988; 52 Fed. Reg. 45044, November 24, 1987. The May 26 letter asked that New York respond to the SIP call in two phases. The first phase calls for certain corrective measures to be taken in the near future. The second phase will be triggered by EPA's issuance of a final post-1987 nonattainment policy, and will set forth additional requirements.

EPA is currently moving toward a final post-1987 policy and the consequent announcement of phase two corrective measures that New York must take in response to the outstanding SIP call. In formulating the phase two requirements for New York, EPA will specifically consider what action New York should be required

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to take regarding the offset exemption for resource recovery facilities in its SIP. At this time, however, EPA has not determined what specific additional measures will be necessary to enable New York to attain the (ozone and) carbon monoxide NAAQS in an expeditious manner. Thus, it would be premature to decide now whether New York must remove the offset exemption for resource recovery facilities.

III. CONCLUSION

From the foregoing, it is clear that EPA must consider many factors in deciding how to respond to your petition. The petition highlights a potential deficiency in the New York SIP that is of particular concern to you. The Agency agrees that this is an important matter. However, EPA's range of concerns is much broader, encompassing not only the entire NSR program, but the Act's Part D requirements as a whole.

The offset requirements of the PSD program for PM-10 under Part C of the Act should prevent a substantial SIP inadequacy as to particulate emissions during the transition away from Part D requirements affecting major new sources of particulates. Regarding carbon monoxide, EPA is presently considering what additional phase two corrective measures New York must adopt in response to the current SIP call. Those deliberations will include consideration of the offset exemption in question. Although EPA's forthcoming phase two requirements may include the relief you seek, it would be premature to take separate action on your petition now. In light of this ongoing process, your petition will be held in abeyance at this time. EPA

anticipates that it will take dispositive action on the petition following a final decision on the phase two corrective measures for the outstanding New York SIP call.

Sincerely,

William J. Muszynski
Acting Regional Administrator

Enclosures

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